



Copyright Office

37 CFR Parts 201 and 205

[Docket No. 2023-1]

Ex Parte Communications

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule

SUMMARY: The U.S. Copyright Office is issuing a final rule establishing procedures governing *ex parte* communications with the Office. This final rule adopts regulatory language set forth in the Office’s February 2023 notice of proposed rulemaking with some modifications in response to public comments. The rule defines *ex parte* communications, provides instructions on how to request an *ex parte* meeting, sets forth the parties’ responsibilities after an *ex parte* meeting, and explains how non-compliant communications will be treated.

DATES: Effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at meft@copyright.gov, or Melinda Kern, Attorney-Advisor, by email at mkern@copyright.gov, or telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

On February 17, 2023, the Office published a notice of proposed rulemaking (“NPRM”) proposing new regulations governing *ex parte* communications with the Office in informal rulemakings.¹ Specifically, the Office proposed codifying its existing

¹ 88 FR 10248 (Feb. 17, 2023).

policies for *ex parte* communications used in prior rulemakings. To aid in drafting the NPRM, the Office reviewed other agencies' comparable regulations and the Administrative Conference of the United States' recommendations.²

The proposed regulations defined which communications with the Office should be considered "*ex parte* communications," as well as which communications fall outside that definition's scope. The NPRM also described the process to request an *ex parte* meeting with the Office. It provided that, after an *ex parte* meeting, parties must submit written summaries of the meeting and proposed a deadline for doing so. It stated that all meeting summaries will be made publicly available on the Office's website. Finally, the NPRM described what communications related to informal rulemaking are impermissible, how the Office will treat such communications, and the steps that Office employees must follow if they receive such communications.

The Office sought public input concerning the proposed rule and received six comments. Commenters generally supported the rule and noted the value of *ex parte* communications in the rulemaking process,³ though some suggested various amendments.⁴ Having reviewed and carefully considered these comments, the Office now issues a final rule that largely adopts the proposed rule, with some modifications made in response to the submitted comments.

II. Final Rule

A. Definition of Ex Parte Meetings

² 79 FR 35988, 35993 (June 25, 2014) (reflecting Administrative Conference of the United States Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking).

³ Authors Alliance Comment at 1; Digital Licensee Coordinator ("DLC") Comment at 1; NCTA – The Internet & Television Association ("NCTA") Comment at 1; National Music Publishers' Association ("NMPA") Comment at 1; Spotify Comment at 1. The Office also received a comment from Harvey Jearld Johnson Jr. *See* Harvey Jearld Johnson Jr Comment at 1.

⁴ Authors Alliance Comment at 2; DLC Comment at 1; NCTA Comment at 1; NMPA Comment at 1; Spotify Comment at 1.

The NPRM proposed that “*ex parte* communications” include only communications to the Office on substantive issues concerning an “ongoing rulemaking.”⁵ The Office received two comments requesting clarification on when a communication would fall within the scope of the *ex parte* communication rule.⁶ The Digital Licensee Coordinator (“DLC”) suggested that the Office revise the proposed rule to broaden its application to communications occurring after the publication of a notification (or notice) of inquiry (“NOI”).⁷ The DLC noted that “in their experience, Copyright Office rulemaking often commences not with an NPRM but with a Notification of Inquiry.”⁸ Spotify echoed the DLC’s suggestion.⁹

The Office agrees with the suggested change and finds that it is consistent with the goal that the *ex parte* communications process “foster[] a complete and transparent rulemaking record.”¹⁰ Accordingly, the final rule clarifies that *ex parte* communications include those communications that occur after the commencement of a rulemaking, whether the rulemaking process begins with the publication of an NPRM or another *Federal Register* notice, such as an NOI.

B. Time Frame for Submitting Meeting Summaries

In the NPRM, the Office proposed that a party that engages in an *ex parte* meeting with the Office normally must submit a summary of the meeting’s discussion within two

⁵ 88 FR 10248, 10252 (Feb. 17, 2023).

⁶ DLC Comment at 3; Spotify Comment at 1.

⁷ DLC Comment at 3. An NOI is an official document that provides or requests information, but is not a proposed or final rule, *i.e.*, it cannot amend the Code of Federal Regulations. *See* 1 CFR 5.9(d) (also stating that an NOI cannot be an Executive order or Presidential proclamation). The Office has used NOIs to announce studies or public consultations, or to request public input in advance of issuing an NPRM. *See, e.g.*, 86 FR 72638 (Dec. 22, 2021) (announcing public consultation on technical measures); 85 FR 34252 (June 3, 2020) (announcing sovereign immunity study); 84 FR 49966 (Sept. 24, 2019) (requesting public comments on implementing title I of the Music Modernization Act).

⁸ DLC Comment at 3 (citing 88 FR 11398 (Feb. 23, 2023) (notification of inquiry on Fees for Late Royalty Payments Under the Music Modernization Act)).

⁹ Spotify Comment at 1.

¹⁰ 88 FR 10248, 10249 (Feb. 17, 2023).

business days, a timeframe that the Office has used in previous rulemakings.¹¹

Commenters requested that the Office consider extending the submission timeframe.¹²

The DLC expressed concern that the proposed timeframe “imposes more than a ‘minimal burden’ on participating parties” and explained that *ex parte* meetings “almost always generate[] follow-up questions from the Office, which require time to investigate, including on occasion additional time to survey DLC members, and then time to draft a response.”¹³ Similarly, the National Music Publishers’ Association (“NMPA”) indicated that the proposed timeframe “poses a hurdle, particularly to individual creators” and small businesses, “[g]iven the level of detail required” and those parties’ potential unfamiliarity with the regulatory process.¹⁴ Moreover, the NMPA explained that in its experience, any questions not answered during *ex parte* meetings “should be [answered]” in the meeting summary, but noted that the proposed timeframe is “often insufficient for compiling the necessary information and drafting a response.”¹⁵ Spotify also recommended that the Office increase the timeframe.¹⁶

The Office concludes that the requested modification to the proposed rule is reasonable and supports the overall goal. Accordingly, the final rule includes a requirement that summaries be submitted within five business days of the *ex parte* meeting. This portion of the rule is designed to provide parties with sufficient time to submit compliant meeting summaries and ease any potential hardships. The final rule, however, retains language that provides the Office with flexibility to set a different deadline for submitting meeting summaries with respect to a specific rulemaking. The

¹¹ See 88 FR 10248, 10249 n.9 (Feb. 17, 2023) (listing several rulemakings where the Office imposed the two-business day timeframe).

¹² DLC Comment at 2–3; NMPA Comment at 1–3; Spotify Comment at 1.

¹³ DLC Comment at 2 (footnote omitted) (quoting 88 FR 10248, 10251 (Feb. 17, 2023)).

¹⁴ NMPA Comment at 2.

¹⁵ NMPA Comment at 2.

¹⁶ Spotify Comment at 1.

Office believes that this flexibility is appropriate in certain limited situations, such as where it needs to enlarge the timeframe to account for extenuating circumstances, or decrease the timeframe to meet a statutory deadline or respond quickly to significant developments, such as new legal precedent or facts, that may impact the Office’s reasoning or the rulemaking’s record.¹⁷

C. Timeframe for Posting Meeting Summaries

While the proposed rule provided that the Office will publish a party’s meeting summary on its website, it did not include a deadline for the publication.¹⁸ The NMPA suggested that the Office amend the proposed rule to impose a timeframe for publishing meeting summaries that is “commensurate with the number of days [that] parties have to file their meeting summary letters.”¹⁹

The Office understands the importance of prompt and effective disclosure of *ex parte* meeting summaries, but declines to include such language in its regulations. In past rulemakings, the Office has uploaded meeting summaries in a timely manner – in most cases within 24 hours of receiving a compliant summary. The Office will continue to post meeting summaries as soon as possible, after determining that they are compliant with its regulations. The Office believes that this practice sufficiently acknowledges and facilitates prompt and effective disclosure.

D. Confidential Information

Commenters made additional suggestions with respect to the ability to provide confidential information in meeting summaries.²⁰ Specifically, the DLC requested that the Office “make clear that the *ex parte* meeting summary may exclude disclosure of any

¹⁷ See, e.g., 17 U.S.C. 1201(a)(1)(C) (noting that the Office must conduct a rulemaking regarding exemptions to the prohibition on the circumvention of technological measures every three years).

¹⁸ 88 FR 10248, 10251 (Feb. 17, 2023).

¹⁹ NMPA Comment at 3–4 (citing timeframes from the Surface Transportation Board, 47 CFR 1102.2(g)(4)(vi) (“within five days of submission”) and the Federal Communications Commission, 47 CFR 1.1206(b)(4) (“at least twice per week”).

²⁰ DLC Comment at 2; Spotify Comment at 1.

confidential or sensitive information provided to the Office,” such as financial and competitive information.²¹ The DLC’s comments cited a previous rulemaking in which the Office allowed public-facing meeting summaries to exclude confidential information²² and a regulation from the Federal Communications Commission that allows parties to request that confidential information be withheld from public inspection.²³ Spotify also recommended that the Office refine the proposed rule related to confidential information.²⁴

After considering these comments, the Office proposes no additional regulatory changes to address submitting confidential information. The Office understands that allowing parties to exclude confidential information from publicly posted meeting summaries would allow parties to be more open to participating in meetings with the Office and more candid in those meetings. At the same time, there is a strong public interest in transparent rulemaking proceedings, which the meeting summaries are intended to promote.

In limited instances in which this balance between these interests weighs in favor of non-disclosure, the Office may exercise its discretion to allow parties to exclude confidential information from publicly posted meeting summaries. The Office may also consider formalizing its practices pertaining to confidential information in a future regulation.

E. Sanctions and Penalties

²¹ DLC Comment at 2.

²² DLC Comment at 2 (citing U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html> (last visited May 11, 2023) (notating meeting summaries where a party “simultaneously submitted a version containing confidential information to advise the Copyright Office of certain confidential information pertaining to its business”)).

²³ DLC Comment at 2 (referencing 47 CFR 1.1206(b)(2)(ii) governing permit-but-disclose proceedings).

²⁴ Spotify Comment at 1.

The NPRM addressed the situation where parties engaged, or attempted to engage, in impermissible substantive communications with the Office regarding an ongoing rulemaking. Specifically, communications not in compliance with the *ex parte* regulations would not be considered part of the rulemaking record, “unless [such information] has been introduced into the rulemaking record through a permitted method.”²⁵ In response, the Authors Alliance asserted that the proposed penalty does not provide any “additional negative effect” on parties engaging in a prohibited *ex parte* communication and urged the Office to strengthen its enforcement mechanisms for noncompliance.²⁶ Where an impermissible *ex parte* communication occurs, the Authors Alliance recommended “sanctions and/or public notification to other parties about any impermissible *ex parte* communication” to “deter such behavior.”²⁷

At this time, the Office is not adding additional sanctions or penalty provisions to its final regulations. In light of its current experience with *ex parte* meetings, the Office believes that the proposed penalty (of not including noncompliant *ex parte* communications as part of the rulemaking record and not considering the substance of such communications) provides enough of a deterrent to prevent noncompliance with the rule. In addition, nothing prevents the Office from notating the meeting on its website or authoring its own meeting summary, if it believes that doing so would serve the public interest. Further, the Office believes it is valuable to evaluate the effectiveness of the penalty, and stakeholders’ adjustments to it, before considering additional sanctions or penalties. In the future, the Office may reevaluate the need for additional sanctions or

²⁵ 88 FR 10248, 10253 (Feb. 17, 2023).

²⁶ Authors Alliance Comment at 2 (suggesting that any noncompliance should result in a public posting of the noncompliance on the Office’s website).

²⁷ Authors Alliance Comment at 2. The Authors Alliance also suggested that to help “disincentivize[]” noncompliance with the proposed rule, the Office should utilize these penalties, which may involve excluding the impermissible communication from the rulemaking record, when parties fail to submit *any* meeting summary. Authors Alliance Comment at 3.

penalties, such as those suggested by the Authors Alliance or used by other federal government agencies.²⁸

F. Attempting to Initiate Noncompliant Ex Parte Meetings with Other Employees

The Authors Alliance recognized that some parties may contact Office staff other than the staff member listed as the contact for further information in the *Federal Register* or the Assistant to the Office’s General Counsel – to initiate an *ex parte* meeting, and suggested that the Office amend its rule to either “explicitly disallow[]” initiating *ex parte* communications with persons not listed in the regulations or “provid[e] a mechanism to manage and disclose such communications.”²⁹

The Office understands that additional clarity is called for on this subject. The final rule clarifies the process for managing requests for an *ex parte* meeting, but declines to incorporate the Authors Alliance’s other suggestions. The rule addresses instances where a party requests an *ex parte* meeting through an Office employee not listed as a contact in the *Federal Register*. In these circumstances, the Office employee will either direct the party to contact the appropriate contact person(s) or forward the request to the contact person(s). Generally, centralizing *ex parte* meeting requests and meeting summaries helps guard against attempts to engage in unauthorized *ex parte* communications.³⁰ It also has the practical benefit of allowing the appropriate Office employee(s) to evaluate the request and coordinate meeting logistics.

G. Other Comments

Commenters made additional suggestions that would expand the scope of the proposed rule. These expansions would permit parties to submit “*ex parte* letters,” *e.g.*,

²⁸ 88 FR 10248, 10251 n.24 (Feb. 17, 2023) (listing sanctions or penalties imposed by other federal government agencies on parties that engage in impermissible *ex parte* communications).

²⁹ Authors Alliance Comment at 3.

³⁰ 88 FR 10248, 10250 (Feb. 17, 2023).

written comments, without first engaging in an *ex parte* meeting with the Office,³¹ allow parties to submit documentary materials during *ex parte* meetings without the Office's prior written approval,³² or expand the rule to apply to additional communications with the Office with respect to its other responsibilities, including policy studies and amicus briefs.³³ At this time, the Office is not adopting these suggestions.

The Office declines to permit parties to file "*ex parte* letters" without first meeting with the Office. Allowing parties to submit written comments without requiring a meeting would risk allowing the *ex parte* process to supplant, not supplement, the ordinary comment submission process.

The Office also declines to allow parties to submit documentary materials during *ex parte* meetings without the Office's prior written approval.³⁴ As stated in the NPRM, *ex parte* communications are intended to provide an opportunity for participants to clarify evidence or arguments made in prior written submissions and to respond to the Office's questions on those matters, to enhance transparency, and to create a comprehensive rulemaking record.³⁵ The introduction of documentary evidence through *ex parte* meetings could introduce unnecessary inefficiencies or delays and deprive rulemaking parties of an opportunity to respond to new documentary evidence.

Further, the Office declines to extend the proposed rule to communications related to the Office's other work, including policy studies and amicus briefs.³⁶ This rulemaking only addresses *ex parte* meetings in informal rulemakings, *i.e.*, where the Office is acting as a regulatory decision-maker. This is consistent with how other agencies have

³¹ NCTA Comment at 1, 3.

³² NCTA Comment at 2.

³³ Authors Alliance Comment at 3–4.

³⁴ NCTA Comment at 2.

³⁵ 88 FR 10248, 10249–50, 10252 (Feb. 17, 2023).

³⁶ Authors Alliance Comment at 3–4.

addressed *ex parte* communications to ensure a complete and transparent rulemaking record.

Finally, at NCTA – the Internet & Television Association’s (“NCTA”) request, the Office is making a minor edit to clarify that any member of the public can request an *ex parte* meeting. This opportunity is not limited to individuals or entities who file comments in the proceeding, *e.g.*, “rulemaking parties.”³⁷ The Office notes that this language is solely a clarification, and not a change to its existing practice.

List of Subjects

37 CFR Part 201

Administrative practice and procedure, Cable television, Copyright, Recordings, Satellites.

37 CFR Part 205

Copyright, Courts.

Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR parts 201 and 205 as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Amend § 201.1 by adding paragraph (d) to read as follows:

§ 201.1 Communication with the Copyright Office.

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³⁷ NCTA Comment at 3.

(d) *Requests for an ex parte meeting.* The rules governing *ex parte* communications in informal rulemakings, including methods to request *ex parte* meetings, are found in 37 CFR 205.24.

PART 205—LEGAL PROCESSES

3. The authority citation for part 205 continues to read as follows:

Authority: 17 U.S.C. 702.

4. Add subpart D, consisting of § 205.24, to read as follows:

Subpart D—*Ex Parte* Communications

Sec.

205.24 *Ex Parte* communications in informal rulemakings.

§ 205.24 *Ex Parte* communications in informal rulemakings.

(a) *General.* The rules in this section governing *ex parte* communications in informal rulemakings are intended to provide an opportunity for parties to clarify evidence or arguments made in prior written submissions, to respond to assertions or requests made by other parties, or to respond to questions from the Copyright Office on any of those matters.

(b) *Applicability.* (1) An *ex parte* communication is a written or oral communication regarding the substance of an ongoing rulemaking between a Copyright Office employee and a member of the public that must be included in the rulemaking record, as described in this section.

(2) An *ex parte* communication does not include the following:

- (i) Communications made prior to the publication of a *Federal Register* document commencing a rulemaking proceeding;
- (ii) Non-substantive inquiries, such as those regarding the status of a rulemaking or the Copyright Office's procedures;

- (iii) Communications made by members of Congress, Federal departments and agencies, the Judiciary, foreign governments, or state and local governments; or
- (iv) Communications required by law.

(3) To the extent that communications made on Copyright Office webpages, including social media pages, would be considered *ex parte* communications under paragraph (b)(1) of this section, such communications are not subject to the rules described in this section and will not be considered as part of the rulemaking record.

(c) *Process*—(1) *Submitting an ex parte meeting request.* (i) A party may request an in-person, telephonic, virtual, or hybrid *ex parte* meeting to discuss aspects of an ongoing rulemaking by submitting a written request to either—

(A) The Copyright Office employee listed as the contact for further information in the *Federal Register* for the ongoing rulemaking that the party wishes to discuss; or

(B) The Copyright Office’s Assistant to the General Counsel. The current contact information for this employee can be obtained by contacting the Copyright Office.

(ii) If a party makes an *ex parte* meeting request to a Copyright Office employee not identified in paragraph (c)(1)(i)(A) or (B) of this section, that employee will either direct the party making the request to contact the appropriate employee(s) or forward the party’s request to the appropriate employee(s).

(iii) The Copyright Office permits *ex parte* meetings in informal rulemakings at its discretion. When *ex parte* meetings are permitted, the Office will determine the most appropriate format (*e.g.*, in-person, telephonic, virtual, or hybrid) for each meeting, but will consider the requesting party’s preferences in making that determination.

(iv) The request should be submitted by email. If email submission of an *ex parte* meeting request is not feasible, a party may contact the Copyright Office for special instructions.

(2) *Ex parte meeting request content.* An *ex parte* meeting request must identify the following information:

- (i) The names of all proposed attendees;
- (ii) The party or parties on whose behalf each attendee is appearing; and
- (iii) The rulemaking that will be discussed.

(3) *Ex parte meeting summary.* (i)(A) Unless otherwise directed by the Copyright Office, within five business days after an *ex parte* meeting, attendees must email the Copyright Office employee identified in paragraph (c)(1)(i)(A) or (B) of this section a letter detailing the information identified in paragraph (c)(2) of this section and summarizing the meeting's discussion. The letter must summarize the substance of the views expressed and arguments made at the meeting in such a way that a non-participating party would understand the scope of issues discussed. Merely listing the subjects discussed or providing a short description will not be sufficient. If email submission of the letter is not feasible, an attendee may contact the Copyright Office for special instructions.

(B) Meeting attendees representing different groups may submit a joint summary letter, but if the groups represent conflicting viewpoints, the groups must submit separate summary letters.

(C) If a party's *ex parte* meeting summary letter does not comply with paragraph (c)(3)(i) of this section or contains inaccuracies, the Copyright Office shall notify the *ex parte* meeting attendee and request a corrected letter. Unless otherwise directed by the Copyright Office, the attendee must submit

the corrected letter within two business days of receiving such notification from the Office.

(D) If the *ex parte* meeting attendee does not provide a corrected letter under paragraph (c)(3)(i)(C) of this section, the Copyright Office may add a notation on its website noting or describing the deficiency. The Copyright Office may also, in its discretion, decline to consider the noncompliant letter as part of the rulemaking record.

(d) *Publication of ex parte communications.* *Ex parte* meeting letters and comments will be made publicly available on the Copyright Office's website.

(e) *Impermissible communications—(1) General; attempts to circumvent the ex parte communication process.* If a party attempts to make an *ex parte* communication outside of the process described in paragraph (c) of this section to a Copyright Office employee, the employee shall attempt to prevent the communication. If unsuccessful in preventing the communication, the employee shall advise the person making the communication that it will not be considered by the Copyright Office as a part of the rulemaking record and shall deliver either a copy of the communication or, if the communication was made orally, a summary of the communication to the Copyright Office's General Counsel and Associate Register of Copyrights.

(2) *Other impermissible communications—(i) Post-deadline communications.*

The Copyright Office may impose a deadline to make *ex parte* meeting requests or to submit written comments for a rulemaking. Parties normally may not make requests after that deadline has passed, unless the deadline is removed by the Copyright Office or until after a final rule is published in the *Federal Register* for that rulemaking.

(ii) *New documentary material.* (A) The Copyright Office generally will not consider or accept new documentary materials once the rulemaking record has closed.

(B) The restriction in this paragraph (e)(2)(ii) does not apply to any Copyright Office requests, *e.g.*, requests for supporting legal authority or additional documentary evidence.

(C) The restriction in this paragraph (e)(2)(ii) does not apply to non-substantive visual aids used in an *ex parte* meeting that are not otherwise submitted by a party as part of the rulemaking record. The Copyright Office, in its discretion, may include a copy of the visual aid in the rulemaking record.

(f) *Effect of impermissible ex parte communications.* No prohibited *ex parte* communication shall be considered as part of the rulemaking record, unless it has been introduced into the rulemaking record through a permitted method. In the interests of justice or fairness, the Copyright Office may waive this restriction.

Dated: July 24, 2023.

Shira Perlmutter,

Register of Copyrights and

Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[BILLING CODE 1410-30-P]

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